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No. 94-596

In the Supreme Court of the United States

OCTOBER TERM, 1994

ALICE B. HUGHES, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

FREDDI LIPSTEIN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Merit Systems Protection Board has jurisdiction under the Civil Service Reform Act of 1978 to review an agency's suspension of an employee for less than 14 days.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 8a) is unreported, but is noted at 11 F.3d 1069 (Table). The initial decision of an Administrative Judge (AJ) of the Merit Systems Protection Board (MSPB) (Pet. App. 4a) is unreported. The final MSPB decision (Pet. App. 6a-7a) is unreported, but the decision is noted at 56 M.S.P.R. 37 (Table).

JURISDICTION

The judgment of the court of appeals was originally entered on October 7, 1993. Pet. App. 8a. Judgment was withdrawn and reentered on January 14, 1994. Pet. App. 10a. The petition for a writ of certiorari was filed on

March 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

At the time of the events in issue, petitioner was employed by the United States Department of the Air Force as a licensed practical nurse (LPN) in the Internal Medicine Clinic at Wright-Patterson Air Force Base in Ohio. Her duties included substituting for registered nurses in the Gastroenterology (G.I.) clinic. Pet. 4. Since 1986, petitioner had been permitted to carry keys to the clinic's drug cabinet. On October 1, 1990, upon request by her supervisor, Lt. Col. Oczkowski, she surrendered the keys.[1] Pet. 5-6. Until the end of the month of October, 1990, petitioner worked in the G.I. clinic without incident. Pet. 5.

On October 29, 1990, petitioner refused to perform her assigned duties in the G.I. clinic. Pet. 6. On October 30, Lt. Col. Oczkowski notified her that her refusal to perform an assignment was unacceptable and that she would be assigned to work in the G.I. clinic on November 2, 1990. At that time, petitioner orally refused to accept the November 2 assignment. On October 31, petitioner's immediate supervisor, Major Rose Barrientez, completed a counseling report on petitioner's refusal to accept the November 2 assignment to the G.I. clinic, in which she informed petitioner that if she refused to comply with the direct order she would be suspended for five days without pay.

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[1] According to agency regulations, only "specifically designated" licensed practical nurses will be allowed to carry keys to medication cabinets and narcotic cabinets. USAF MC Reg. 168-50(6)(c) (1989). Pet. App. 14a.

On November 2, petitioner refused, once again, to work in the G.I. clinic, stating that she felt very "uncomfortable" working there without keys to the drug cabinet. Pet. 7. Petitioner was concerned that she would be unable to accommodate the needs of the patients when she was working alone in the recovery area if she did not have access to the prescription medications. Petitioner has asserted that she was told to "go home and leave the building" when she refused to perform her assignment. Pet. 7. She left the building on November 2, 1990, and did not return until November 9, 1990. Pet. 7. On November 6, 1990, petitioner's supervisor notified her that she was AWOL. Pet. 7. According to agency records, petitioner was AWOL from November 2 to 9, 1990. Pet. 7-8.

Upon her return on November 9, 1990, petitioner again refused a direct order to work in the G.I. clinic, but she did work in the clinic at a later date. Pet. 7-8. On December 21, 1990, the agency sent petitioner a notice of proposed suspension for failure to comply with orders on November 2 and 9, 1990. Pet. 8. The notice advised petitioner that she had 21 days in which to reply to the charges, and petitioner responded in writing. Pet. 8. On January 25, 1991, after considering petitioner's response, the agency issued a decision suspending petitioner for two days, January 30 and 31, 1991. Following that suspension, petitioner performed her assigned duties in the G.I. clinic without incident. Pet 8.

Petitioner appealed the January 30 and 31, 1991, suspension to an arbitrator pursuant to an agreement between her union and the Air Force. Pet. App. 1a-3a. After a hearing on June 7, 1991, the arbitrator denied petitioner's appeal because "her refusal to obey a direct order [to work in the G.I. clinic] was not warranted." *Id.* at 2a-3a.

Petitioner appealed both the five-day and the two-day suspensions to the MSPB. Pet. App. 4a-5a. On July 23, 1992, an Administrative Judge (AJ) dismissed petitioner's appeal, on the ground that the MSPB does not have jurisdiction over agency suspensions of 14 days or less. Petitioner sought review of the AJ's decision by the Board. The MSPB denied the petition for review of the initial decision because the petition did not meet the criteria for review set forth at 5 C.F.R. 1201.115.[2] Pet. App. 6a-7a. On October 7, 1993, the Federal Circuit summarily affirmed the MSPB's decision. *Id.* at 8a.[3]

ARGUMENT

1. The jurisdiction of the MSPB is not plenary, but is "limited to those matters over which it has been given jurisdiction by statute or regulation. * * * The Board does not have jurisdiction over all actions that are alleged to be incorrect." *Weaver* v. *Department of Agriculture*, 55 M.S.P.R. 569, 573 (1992). The MSPB has jurisdiction to hear appeals from employees seeking corrective action with respect to "a suspension for more than 14 days." 5 U.S.C. 7512(2).[4] The Board does not

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[2] Section 1201.115(c), 5 C.F.R., provides, in relevant part, that "[t]he Board * * * may grant a petition for review when it is established that * * * (2) The decision of the judge is based on an erroneous interpretation of statute or regulation."

[3] After learning that the petitioner was erroneously advised of the date on which the court's judgment was entered, the Federal Circuit withdrew its decision and reissued its judgment on January 14, 1994. Pet. App. 10a.

[4] Subchapter I of Title 5 (Sections 7501-7504) provides for suspensions of 14 days or less. Under Section 7503, an employee may be suspended for 14 days or less "for such cause as will promote the efficiency of the service." Section 7503 also sets forth the procedures to which an employee is entitled prior to such a suspension. That Subchapter does not, however, give an employee

have jurisdiction under any statute or regulation over suspensions of 14 days or less. *Fidler* v. *United States Postal Service*, 53 M.S.P.R. 440 (1992); *Harrison* v. *United States Postal Service*, 26 M.S.P.R. 37, 39 (1985); *Powell* v. *Department of Army*, 9 M.S.P.R. 237 (1981). Petitioner was suspended for five days in November, 1990, and for two days on January 30 and 31, 1991. Pet. 7-8. Because neither of petitioner's suspensions covered a period of time greater than 14 days, the MSPB did not have jurisdiction over her appeal. Consequently, the MSPB correctly denied petitioner's petition for review of her suspensions. See *Saunders* v. *MSPB*, 757 F.2d 1288, 1290 (Fed. Cir. 1985).

2. With respect to the two-day suspension, the Air Force fully complied with its applicable regulations. See AFR 40-750 (1982) (Pet. App. 16a-20a). The agency provided petitioner with written notice of the agency's intent to suspend her for her refusal to work on November 2 and November 9. She was given 21 days in which to reply in writing to the allegations, and she availed herself of that opportunity. Pet. 8. The agency carefully considered her response and issued a notice of suspension based on her failure to follow direct orders on the dates in question.

As to the five-day suspension, the Air Force complied with AFR 40-750 (1982) but did not fully comply with the procedures set out in 5 U.S.C. 7503. AFR 40-750 (1982) (Pet. App. 16a-20a) provides that "[t]he minimum notice period for a suspension of 14 days or less *must* not be less than 24 hours. Within the Air Force, this period is

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the right to appeal an adverse decision to the MSPB. Subchapter II (Sections 7511-7514), dealing with suspensions for more than 14 days, *does* entitle an employee to appeal an adverse action to the MSPB. Section 7513(d).

normally not less than 7 days." AFR 40-750(23)(a)(2) (1982) (Pet. App. 18a). Although petitioner received less than the normal seven days' notice for the five-day suspension, the Air Force nevertheless complied with the regulation by providing her with at least 24 hours' notice. In addition, the Air Force informed petitioner of the potential consequences of her refusal to perform her assigned responsibilities prior to the date that she actually refused to work in the G.I. clinic. She thus had an opportunity to avoid the suspension by fulfilling her responsibilities as instructed. Section 7503(b), however, entitles an employee to written notice in advance stating specific reasons for the proposed action, a reasonable time to answer orally and in writing, representation by an attorney or other representative, and a written decision and the reasons therefor at the earliest practicable date. The agency's failure to comply strictly with these procedures in the context of the five-day suspension, however, does not constitute a basis for appeal to the MSPB. As noted above, Subchapter I does not provide an employee with the right to an appeal and does not confer jurisdiction over such an appeal upon the MSPB. See 5 U.S.C. 7501-7504.

3. Petitioner's claim that the revocation of her access to the secured prescription drug area is analogous to the revocation of a security clearance (Pet. 10) is presented for the first time in this Court. "Though, when reviewing a judgment of a federal court, [this Court has] jurisdiction to consider an issue not raised below, * * * [it is] generally reluctant to do so." *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984). In any event, petitioner's reliance on *Egan* v. *Department of Navy*, 28 M.S.P.R. 509, 519 (1985), aff'd, 868 F.2d 1277 (Fed. Cir.), rev'd, 484 U.S. 518 (1988), is misplaced. In *Egan*, the Board addressed an employee's removal from his position

as a labor leader because he was unable to obtain a security clearance. In that case the Board held that:

> in an adverse action *over which the Board has jurisdiction* and which is based substantially on the agency's revocation or denial of a security clearance, the Board has no authority to review the agency's stated reasons for the security clearance determination. However, the Board will review the procedures utilized by the agency to ensure that the agency afforded the appellant procedural due process.

Egan, 28 M.S.P.R. at 519 (emphasis added); see also *Department of Navy* v. *Egan*, 484 U.S. 518, 525-534 (1988). Here, unlike *Egan*, no adverse action was taken against petitioner as a direct result of her loss of access to the prescription drug area; petitioner was suspended for *her* refusal to comply with work assignments after her access was revoked. In addition, the Board here, unlike in *Egan*, did not have jurisdiction over the adverse action that was taken against petitioner, because her suspension was for less than 14 days. See pp. 4-5, *supra*.

4. Petitioner's assertion that loss of access to the drug cabinet was tantamount to a demotion (Pet. 14) is incorrect. In some instances, agency action may constitute a constructive demotion if the action results in the employee's receiving a lower pay rate or different job duties. See *Randall* v. *United States Postal Service*, 59 M.S.P.R. 199 (1993) (employee assigned to lower-graded position pursuant to agency restructuring presented non-frivolous allegation of Board jurisdiction). Petitioner, however, has continued to work in the G.I. clinic, performing her prior duties at the same pay rate. Pet. 8.

Finally, petitioner's claim that withdrawal of her keys to the drug closet violated her due process rights is frivolous. Air Force regulations plainly state that only

"specifically designated licensed practical nurses * * * will be allowed to carry keys to the medication cabinets and narcotic cabinets." USAF MC Reg. 168-50(6)(c) (1989) (Pet. App. 14a). Because petitioner had no statutory right to carry the keys, the agency's request for the return of the keys did not deprive her of any interest protected by the Due Process Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

FREDDI LIPSTEIN
Attorney

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